Supreme Court, U. S.
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IN THE

Supreme Court

OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-5091

JOYCE SHIRLEY,

Petitioner,

vs.

STATE NATIONAL BANK OF CONNECTICUT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Respondent does not question the jurisdictional requisites as set forth in the Petition.

QUESTIONS PRESENTED

Respondent does not accept Petitioner's statement of the Question Presented. The first question (Petition at p. 2) incorrectly assumes that Respondent's conduct was "expressly authorized and governed" by Connecticut Statutes. The second question (Petition at pp. 2-3)

assumes the existence of state action and was never reached by either the trial court or the Court of Appeals.

We submit that the only question before this Court is as follows:

> Where an installment purchaser of an automobile agreed that if she defaulted in payment of the purchase price the seller or its assignee could repossess the automobile, and after such default occurred the assignee bank peacefully repossessed the automobile by self-help and without the aid of any public official or legal process, did the bank thereby deprive the purchaser of her constitutional rights, giving her a claim for relief under the Civil Rights Act, 42 U. S. C. § 1983?

STATEMENT OF THE CASE

Petitioner's "Statement of Facts" includes many assertions which are irrelevant to a determination of the Questions Presented. The essential facts of record are accurately summarized by Judge Mulligan at 493 F. 2d 740-741 as follows:

> "The complaint alleged that on or about October 7, 1971, the plaintiff entered into a contract of conditional sale with Hart Volkswagen Corp. of West Hartford for the purchase of a Ford Thunderbird. The contract provided for 24 monthly instalment payments by the plaintiff starting on November 1, 1971. In the contract, plaintiff acknowledged receipt of an exact copy of the completed and executed instrument. The contract on its face warned the buyer not to sign if there were any blank spaces and advised the purchaser that she had the right to pay in advance the full amount

due and to obtain a partial refund of the finance charge. The contract further advised that the purchaser had the right to redeem the property if it was repossessed for default, as well as the right to require, under certain conditions, a resale of the property. The contract defined defaults, which included the failure to pay any part of the purchase price when due. The plaintiff agreed to return the automobile in the event of default and further acknowledged the right of the seller in such event, with or without previous notice, to repossess the vehicle. On or about October 7, 1971, the seller assigned the conditional sales contract to the defendant bank, State National Bank of Connecticut. After seven instalments, the plaintiff defaulted and made no payments for June, July or August, 1972. On or about August 23, 1972, the defendant repossessed the automobile."

There is no claim in the Complaint or elsewhere in the Record that the repossession was other than private and peaceful. It is not alleged that the retaking involved the participation of any law enforcement officer or other public official or that it was accomplished pursuant to or with the aid of any court process.

On September 12, 1972, Petitioner commenced the present action in the United States District Court for the District of Connecticut seeking money damages and a declaratory judgment that Section 42-98 of the Connecticut General Statutes is unconstitutional. Petitioner sought to invoke the jurisdiction of the district court under 28 U. S. C. 1343 (3) and (4), 42 U. S. C. § 1983 and 28 U. S. C. §§ 2201 and 2202.

On November 30, 1972, the Respondent moved to dismiss the action for failure to state a claim upon which

relief could be granted and for lack of jurisdiction over the subject matter on the ground that the requisite state action necessary to invoke the jurisdiction of the court under 28 U. S. C. § 1343 and 42 U. S. C. § 1983 was not present.

On April 2, 1973, the court having heard the parties, filed its Ruling on Motion To Dismiss granting Respondent's Motion To Dismiss for failure to state a claim upon which relief could be granted. On April 3, 1973, judgment entered in accordance with the Ruling on Motion To Dismiss.

On February 14, 1974, the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court. On June 18, 1974, Mr. Justice Marshall granted Petitioner's Application for Extension of Time Within Which to File Petition for Certiorari and extended the time for the filing of the Petition to August 26, 1974. The Petition was filed with this Court on August 6, 1974.

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

Following the decisions of this Court in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), virtually the entire spectrum of remedies available to creditors came under attack throughout the country. Initially, the assault focused upon pre-judgment creditor remedies where there was no question that state action was involved and the issue under scrutiny by the courts was whether or not the requirements of procedural due process were satisfied by these various remedies. The present case represents an extension of the assault upon creditor remedies to reach the con-

tractually based private action of self-help.[1] To accomplish this, Petitioner urges the Court to adopt an interpretation of the scope of the Fourteenth Amendment that will directly involve the federal judiciary in the regulation of private conduct under the guise of constitutional interpretation.

The Constitution of the United States structures and regulates the federal government and imposes limitations on both federal and state governments designed to protect the fundamental rights of our citizens against infringement by the abuse of governmental power. It is not the function of the Constitution to regulate private conduct.[2] Under our system, private conduct is regulated by mutual agreement, by the common law and by the laws enacted by our state and federal legislative bodies.

Section 1 of the Fourteenth Amendment to the United States Constitution by its express terms is a restraint upon the power of the states—not the people. As this Court stated in *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948):

> "Since the decision of this Court in the *Civil Rights Cases,* 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Four-

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[1]A comprehensive compilation of cases involving constitutional attacks on self-help repossessions appears at Appendix "A" of the Motion For Permission To File Brief Amici Curiae filed in *Adams* v. *Southern California First National Bank,* 492 F. 2d 324 (9 Cir. 1974), *petition for cert. filed,* 42 U. S. L. W. 3693, (U. S. June 7, 1974) (No. 73-1842, 1973 Term). Appendix "B" to that Motion contains a compilation of cases involving constitutional attacks upon other self-help creditor remedies.

[2]There appear to be only two exceptions to this basic constitutional concept, viz.: the prohibition against slavery in the Thirteenth Amendment, which on its face regulates both private and governmental conduct and is the basis for a body of decisional law involving racial discrimination in which state action is not an essential element (*Jones* v. *Mayer Co.,* 392 U. S. 409, 413 (1968)), and the Eighteenth or Prohibition Amendment.

> teenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Pursuant to the power conferred in Section 5 of the Fourteenth Amendment, the Congress enacted what is now 42 U. S. C. § 1983, the statute relied upon by the Petitioner. It provides:

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Consistent with the purpose of the Fourteenth Amendment, this Court and lower federal courts have construed the phrase "under color of any statute" as being limited to conduct involving some form of state action.[3]

The Petitioner urges a departure from these basic constitutional concepts and argues that any private conduct which is permitted to continue in existence and which is recognized even in a neutral way by state law is action taken under color of state law within the meaning and jurisdictional scope of 42 U. S. C. § 1983.

Specifically, Petitioner argues that Section 42-98 of the Connecticut General Statutes by recognizing and regulating repossession converts private activity into state action

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[3] *Adickes* v. *S. H. Kress & Company*, 398 U. S. 144, 152 n.7 (1970); *United States* v. *Price*, 383 U. S. 787, 794-795 n.7 (1966).

because it encourages or compels repossession, delegates public functions to private individuals, constitutes state involvement through pervasive regulation and reflects an improper state policy favoring repossession.

The act of repossession, which is the conduct of which Petitioner complains, has been unaffected by the enactment of Section 42-98 of the Connecticut General Statutes[4] which is no different in any important respect from § 9-503 of the Uniform Commercial Code.[5] These statutes codify pre-existing common law principles recognizing the right of peaceful repossession[6] and are designed to protect debtors by prohibiting repossession where it cannot be accomplished without breach of the peace and by defining post-repossession procedures so as to protect the financial interests of the debtor from forfeiture.

The difference between repossession by a private citizen and the action of a state law enforcement officer under authority of a writ of replevin or sequestration is substantial. A private citizen may seek to solve his problem without the intervention of the courts so long as he can do so peacefully. However, he may lawfully be resisted, and if resistance is offered so that there is a threat of breach of the peace, the private citizen's right of self-help terminates. In sharp contrast, the law enforcement officer who serves a writ of replevin, sequestration or other court

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[4]First enacted in 1947, Supp. 1277i.

[5]Connecticut General Statutes, § 42a-9-503, first enacted in Connecticut in 1959, P. A. 133. See Appendix A.

[6]Illustrative Connecticut cases involving conditional sale contracts antedating these statutes include *Appleton* v. *Norwalk Library Corporation*, 53 Conn. 4, 8, 22 A. 681 (1885); *Crompton* v. *Beach*, 62 Conn. 25, 38, 25 A. 446 (1892); *Stalker* v. *Hayes*, 81 Conn. 711, 715, 71 A. 1099 (1909); *Sager* v. *Schmidt*, 98 Conn. 736, 737, 120 A. 504 (1923); see also, *Swift's Digest of the Laws of Connecticut* (Dutton Rev. 1851) Vol. I, Book Third, Chapter I, side pages 461-462; *Bowler* v. *Eldridge*, 18 Conn. 1, 16 (1846); *Baldwin* v. *Hayden*, 6 Conn. 453 (1827).

process authorizing him to take property into his possession may not lawfully be resisted. Because such action involves the exercise of governmental power, this Court has held in *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), and more recently in *Mitchell* v. *W. T. Grant Co.,* 42 U. S. L. W. 4671 (U. S. May 13, 1974), that prior notice and hearing are required.

Petitioner claims to have found a theme running through the recent decisions of this Court which brings the purely private action of repossession within the purview of the Fourteenth Amendment. An examination of the principal cases relied upon, however, shows that all of them involved some abuse of state governmental power.

1. Burton v. Wilmington Parking Authority.[7]

This Court has found state action in situations in which a state has "so far insinuated itself into a position of interdependence" with a private party that it must be recognized as a "joint participant in the challenged activity".[8] Such was the case in *Burton* where racial discrimination was practiced by the concessionaire of a restaurant in a public-building constructed, owned, maintained and operated with public funds by a state agency. No analogous relationship exists between the state and a creditor who repossesses pursuant to a retail installment contract. The state and the repossessing creditor are neither joint participants nor are they parties to any agency or contractual relationship.

2. Adickes v. S. H. Kress & Company.[9]

State action has been found where private persons act in concert with state officials. In *Adickes,* local police officers enforced the custom compelling private restaurants

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[7]365 U. S. 715 (1961).
[8]365 U. S. 715, 725 (1961).
[9]398 U. S. 144 (1970).

to refuse to serve caucasians while in the company of negroes by arresting the plaintiff for vagrancy. The peaceful repossession in this present case did not involve the participation of any law enforcement officer, state agency or official or the enforcement of any private conduct by any such state agent.

3. Reitman v. Mulkey.[10]

In the area of racial discrimination this Court has sometimes found state action present where private conduct has been compelled or strongly encouraged by state law. In *Reitman,* private persons were found to have been encouraged by the government to discriminate on the basis of race in the sale or rental of real estate. The encouragement was found to have resulted from a drastic change in the law which invalidated prior legislation prohibiting such discrimination and elevated discriminatory housing practices to the level of a constitutionally protected right.

Similarly, in *Peterson* v. *City of Greenville,* 373 U. S. 244 (1963), this Court invalidated statutes which required or compelled such private action as the segregation of races in public restaurants.

State laws which merely recognize a creditor's right to repossession upon default neither compel nor encourage a creditor to effect a private rather than a judicial repossession. Section 42-98 of the Connecticut General Statutes and Section 9-503 of the Uniform Commercial Code are neutral as to whether the creditor should retake possession through self-help or with the aid of the law enforcement machinery and do not reflect any state policy in this regard. Both sections positively discourage self-help repossession in cases where there may be a breach of the peace.

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[10]387 U. S. 369 (1967).

4. Moose Lodge v. Irvis.[11]

The argument that state-conferred benefits and extensive patterns of state regulation can transform private conduct into state action has been rejected by this Court which observed in *Moose Lodge* that:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra,* and adhered to in subsequent decisions." 407 U. S. 173.

5. Williams v. United States.[12]

State action has been found by this Court in cases where there has been a delegation of such traditional state functions as law enforcement, such as in *Williams,* the administration of the election process[13], and the operation and administration of public facilities.[14]

The exercise of a contractual right to repossess where no sheriff, police officer or other public official is involved and no writ of replevin, attachment or other court process was used and where no breach of the peace was created

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[11]407 U. S. 163 (1972).

[12]341 U. S. 97 (1951).

[13]*Smith* v. *Allwright,* 321 U. S. 649 (1944); *Terry* v. *Adams,* 345 U. S. 461 (1953).

[14]*Evans* v. *Newton,* 382 U. S. 296 (1966); *Marsh* v. *Alabama,* 326 U. S. 501 (1946).

does not involve the delegation, divestiture or abdication of functions of the state and does not "cloak" a creditor with authority to act derived from the state. Repossession is an act of self-help, which by definition is not and never has been a governmental function.

The Petitioner further asserts that a repossessing creditor undertakes an adjudicatory function normally performed by the courts. This argument represents a fundamental misunderstanding of the manner in which private disputes are resolved in our society.

In the vast majority of personal and commercial transactions there is no significant dispute as to the facts or the law, and even where such disputes potentially exist private parties are constantly making their own judgments as to their own legal rights and the rights of others with whom they are dealing. The governmental function performed by the courts and by law enforcement officers is to deal with that relatively minor number of instances in which differences have arisen and the parties are unable to resolve those differences themselves.

In another context, this Court has observed:

> ". . . our society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, *if resorted to,* is paramount". *Boddie* v. *Connecticut,* 401 U. S. 371, 375 (1971) (emphasis added).

Accordingly, the resolution of potential disputes between private persons is primarily a private function in our society. It only becomes public when one party or the

other elects to resort to the courts. It is sound constitutional law to say that before the government takes action injurious to the interests of a citizen, there must be notice and hearing. To attempt to apply this principle to the acts of private citizens who might cause damage to other citizens is neither practical nor desirable.

6. Mitchell v. W. T. Grant Co.[15]

The reliance of Petitioner upon the recent decision of this Court in *Mitchell* is entirely misplaced. State action, the essential missing ingredient in the instant case, was clearly present in *Mitchell* where a writ of sequestration had been issued by a Louisiana state court and had been effectuated by state officials.

Petitioner in this case lost possession of the automobile as a result of purely private action. The State of Connecticut, its laws and its officials had no connection with the matter. Accordingly, procedural due process requirements are not applicable, and the repossession did not deprive the Petitioner of any constitutional right.

II. THE DECISIONS OF THE APPELLATE COURTS WHICH HAVE CONSIDERED THE QUESTION PRESENTED HEREIN ARE UNIFORM

The decisions of the four other circuits which have to date decided the question presented herein are consistent with that of the United States Court of Appeals for the Second Circuit in the present case. These decisions are as follows:

> *Gibbs* v. *Titelman*, App. Nos. 74-1062 to 74-1067 (3 Cir. August 1, 1974).
>
> *James* v. *Pinnix*, App. No. 73-1866 (5 Cir. June 10, 1974).

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[15]42 U. S. L. W. 4671 (U. S. May 13, 1974).

Nowlin v. *Professional Auto Sales, Inc.*, App. No. 73-1348 (8 Cir. April 25, 1974) *petition for cert. filed*, 42 U. S. L. W. 3703 (U. S. June 19, 1974) (No. 73-1897, 1973 Term), and its companion case *Mayhugh* v. *Bill Allen Chevrolet*, App. No. 73-1450 (8 Cir. April 25, 1974).

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The reported state supreme court decisions of which Respondent is aware have decided the issue presented herein favorably to the position of Respondent.[16]

In each of the above cited appellate court cases, it was held that state action was required to bring conduct within the scope of the Fourteenth Amendment to the Constitution of the United States or 42 U. S. C. § 1983, and that private repossession does not involve state action.

Petitioner's suggestion that if certiorari is granted in the present case oral argument should be scheduled concurrently with that in *Jackson* v. *Metropolitan Edison Company*, 483 F. 2d 754 (3 Cir. 1973), *cert. granted*, 42 U. S. L. W. 3468 (U. S. Feb. 19, 1974) (No. 73-5845, 1973 Term), is in our view inappropriate.

The issue presented in *Jackson* is whether a public utility acts under color of state law when it terminates a customer's electrical service for a non-payment of a bill. The thrust of the argument asserted by Petitioner in *Jackson*

[16] *Brown* v. *United States National Bank of Oregon*, 509 P. 2d 442, (Ore. Sup. Ct. 1973) and *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Fla. Sup. Ct. 1973)

is that public utilities constitute state-sanctioned monopolies which perform a public function. The present case turns on actions taken by a party to a private contract.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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APPENDIX A

§ 42a-9-503. Secured party's right to take possession after default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 42a-9-504.